

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer’s decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Where a local government in defending its decision asserts a legal theory in its response brief, but that legal theory was not adopted by the challenged decision and the challenged decision relied on a different legal theory, LUBA will not consider the legal theory that is asserted for the first time in the response brief. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Absent a showing of substantial prejudice to the moving party, that a response brief is printed in 12-point font rather than the 14-point font required by OAR 661-010-0030(2)(d) is not a basis to strike the brief, at least where the smaller font size is not used to effectively avoid the page limits imposed under LUBA’s rules. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** LUBA will not defer to an interpretation of a zoning ordinance that appears only in a city’s reply brief and is inconsistent with an implied interpretation that is included in the city council’s decision on appeal. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Where an intervenor-respondent attempts to defend a local government’s decision by arguing that the local government correctly decided the matter but should have done so based on a different interpretation of its zoning ordinance that the local government specifically rejected, and intervenor-respondent does not file a cross-petition for review or include a cross assignment of error in its response brief, LUBA will not consider the interpretive question. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** When three appeals have been consolidated and petitioners have filed three separate petitions for review, a respondent’s request to file a single 114-page respondent’s brief responding to all three petitions for review will be allowed. *Foland v. Jackson County*, 61 Or LUBA 500 (2010).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** A cross-assignment of error must assign error to some ruling or omission in the challenged decision and seek reversal or remand based on that alleged error. A cross-assignment of error is not a vehicle to request (1) that LUBA address in the first instance an alternative legal theory under

which the application could have been approved, but was not, and (2) that LUBA affirm the challenged decision based on that legal theory. *NAAVE v. Washington County*, 59 Or LUBA 153 (2009).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Where a respondent’s brief includes what are in substance cross-assignments of error, even though they are not denominated as such, LUBA will consider those de facto cross-assignments of error, provided they are reasonably recognizable as cross-assignments of error. *Pete’s Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** LUBA will deny petitioners’ motion to dismiss an intervenor-respondent’s brief that is filed one day late, where (1) the late-filed brief is filed 21 days before oral argument and is only five pages long, (2) the late-filed brief largely supplements the city’s timely filed 24-page brief, and (3) petitioners neither allege nor demonstrate that their substantial rights were prejudiced by the late filing. *O’Brien v. City of Portland*, 52 Or LUBA 113 (2006).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** An intervenor-respondent may raise cross assignments of error in the response brief, but LUBA will only address those cross assignments of error if one or more of the petitioner’s assignments of error are sustained and the decision is otherwise subject to reversal or remand. *Dauenhauer v. Jackson County*, 51 Or LUBA 539 (2006).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** When an intervenor-respondent raises cross-assignments of error in a response brief rather than assignments of error in a cross petition, LUBA will only address the cross-assignments of error if the challenged decision is reversed or remanded on any of the petitioner’s assignments of error. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** It is consistent with LUBA’s rules to advance in a response brief what corresponds to a cross-assignment of error under Oregon Rules of Appellate Procedure 5.57(2), *i.e.*, an argument that, if the relief sought by the petitioner is granted, LUBA should also reverse or remand a related intermediate ruling of the decision maker. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** Because nothing in LUBA’s rules prohibits including a cross-assignment of error in the response brief, LUBA rules governing response briefs contemplate inclusion of “other matters” in the response brief, and many cross-assignments of error cannot practicably be advanced except in the response brief, it is consistent with LUBA rules to include a cross-assignment of error in a response brief. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** The principle of affirmative waiver of issues before the local decision maker described in *Newcomer v. Clackamas*

*County*, 92 Or App 174, 758 P2d 369 (1988), does not apply to representations before LUBA, such as a respondent's representation that it would not file a response brief. To the extent a petitioner relies on such a representation to submit an abbreviated petition for review, it does so at its own risk. LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Respondents may not fail to respond to a subassignment of error in their brief and then provide a response for the first time at oral argument. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where a response brief was filed a week after the brief was due, and petitioners were not made aware that the response brief had been filed until they appeared at oral argument and thus were not prepared to respond to the brief, petitioners' substantial rights were prejudiced, and LUBA will reject the response brief. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** A motion requesting permission to exceed the 50-page limit on briefs imposed by OAR 661-010-0030(2)(b) will be denied where the motion is filed three days before the brief is due and does not state how many additional pages are requested or indicate whether other parties oppose the motion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 561 (2001).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where a state agency files a brief pursuant to ORS 197.830(7) on the date of the filing of the response brief, respondent will be allowed to file a supplemental response brief addressing the issues raised in the state agency brief. *Bruggere v. Clackamas County*, 36 Or LUBA 799 (1999).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** LUBA will deny respondents' request to file a response brief that exceeds LUBA's page limits, where respondents fail to demonstrate why an adequate response is impossible within the allotted limits, and allowing the request would be inequitable to other respondents who have complied with LUBA's rules. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 754 (1998).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** In addressing a substantial evidence challenge, where the response brief provides no transcripts or partial transcripts and provides no assistance in locating the portion of the audio tapes in the record where relevant testimony is located, LUBA will not search for testimony on audio tapes. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where a land use decision is challenged on evidentiary grounds, LUBA relies on the parties to direct it to relevant evidence in the record so that LUBA can determine whether there is substantial evidence in the record to support the challenged decision. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent’s.** The failure of findings to identify the evidence that supports the findings is not necessarily fatal, so long as the response brief or the briefs filed by other parties direct LUBA’s attention to evidence in the record that supports those findings. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** New objections to the applicability of an identified approval criterion should be raised in a cross-petition for review, and are not properly presented in a response brief. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Arguments that the county should have based its decision on the subject application on statutory provisions, rather than on compliance with local standards, must be presented in a petition for review or cross-petition for review. Such arguments are not properly presented in a respondent's brief. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** A respondent or intervenor-respondent wishing to challenge some aspect of a land use decision in a LUBA appeal must either file a timely cross-petition for review or file a separate appeal. Cross assignments of error may not be included in a respondent's brief. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** LUBA will not grant a request for an extension of time to file respondents' briefs, over petitioner's objection, if the requested extension would necessitate a delay in oral argument and a delay in issuing LUBA's final opinion and order. *Waugh v. Coos County*, 26 Or LUBA 599 (1993).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where a motion to intervene and intervenors' response brief were filed six days after respondents' briefs were due and were received by petitioners one week before oral argument, and intervenors' brief does not raise new issues warranting the filing of a reply brief, petitioners' substantial right to prepare and submit their case was not prejudiced by the untimely filing. *Alliance for Resp. Land Use v. Deschutes County*, 23 Or LUBA 476 (1992).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** OAR 661-10-050(3)(b) requires that intervenors-respondent file their brief within the time provided for filing the respondent's brief. Where the time for filing the respondent's brief is extended beyond the 42-day deadline established by OAR 661-10-035, intervenors-respondent are entitled to the same extension under OAR 661-10-050(3)(b). *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where intervenors' delay in filing their motion to intervene and brief results in no delay of the appeal and no prejudice to petitioners' substantial rights, the failures to file a timely motion to intervene

and brief are technical violations of LUBA's rules and provide no basis for denying the requested intervention. *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Failure to file a respondent's brief within the time specified in an order issued by LUBA pursuant to OAR 660-10-026(5) is a technical violation of LUBA's rules which will not interfere with LUBA's review unless the substantial rights of parties are prejudiced. Where petitioners have ample time to review respondent's brief prior to oral argument, their substantial rights are not prejudiced. *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 604 (1991).

**27.5.2 LUBA Procedures/Rules – Briefs – Respondent's.** Where (1) intervenor-respondent's brief is filed 21 days late, (2) petitioners receive the brief less than one full day before oral argument, and (3) providing petitioners an opportunity to submit argument in response to the brief would delay issuance of LUBA's final opinion, the late filing of intervenor's brief is not an excusable technical violation of LUBA's rules. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).